No. 80-669

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BENSON REALTY CORP., CHAI ASSOCIATES, INC., HINCKLEY REALTY CORP., 615 EAST 168TH ST. CORP., ROBERT BEREZIN, SHIRLEY BEREZIN, MORRIS FADER, ANITA FADER, COMMUNITY HOUSING IMPROVEMENT PROGRAM, INC., BRONX REALTY ADVISORY BOARD, INC., ASSOCIATED BUILDERS & OWNERS OF GREATER NEW YORK, INC., AND 383 EAST 17TH ST. INC., individually and on behalf of all others similarly situated,

Appellants,

against

EDWARD KOCH, AS MAYOR OF THE CITY OF NEW YORK, ANTHONY GLIEDMAN, AS ADMINISTRATOR OF THE HOUSING AND DEVELOPMENT ADMINISTRATION OF NEW YORK CITY, DANIEL W. JOY, AS COMMISSIONER OF THE DEPARTMENT OF RENT AND HOUSING MAINTENANCE OF NEW YORK CITY, JOSEPH B. GOLDMAN, AS COMMISSIONER OF THE NEW YORK STATE DIVISION OF HOUSING & COMMUNITY RENEWAL AND CITY RENT AGENCY,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

HARRY MICHELSON
General Counsel
Rent Control Division, HPD
Attorney for Appellees
EDWARD KOCH, as Mayor of the City of New York,

ANTHONY GLIEDMAN, as Administrator of the Housing and Development Administration of New York City, and

DANIEL W. JOY, as Commissioner of the Department of Rent and Housing Maintenance of New York City
110 Church Street
New York, N.Y. 10007
212—566-5112

Questions Presented

1. Whether the New York Court of Appeals properly upheld the constitutionality of the New York City rent control laws against the attacks which pleaded no facts but instead relied on anti-rent control writings and opinions. The New York Court of Appeals properly held that the presumption of constitutionality was not overcome by argumentative opinions of rent control opponents. It held that the need for controls is a matter for legislative determination. There is no substantial federal question.

2. Whether constitutional objection to the administration of the rent control laws, as distinct from the law itself, is judicially cognizable. In the absence of any citation of judicial authority by the appellants in either their briefs or in answer to questions on oral argument, the Court of Appeals rejected this objection on the law without referring to the substantial factual refutation of these claims presented in an affidavit in opposition to appellants motion for summary judgment. There is no substantial federal question.

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Appellants,

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Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

Preliminary Statement

Appellees, other than the State Commissioner of Housing and Community Renewal who has moved separately, move to dismiss the appeal taken to this Court from the final

order and judgment of the Court of Appeals of the State of New York entered in this action on June 26, 1980, or in the alternative to affirm the said order.

Opinions Below

The New York Court of Appeals opinion is reported at 50 N Y 2d 994, 431 N.Y.S. 2d 475, *sub nom. Benson Realty Corp.* v. *Beame.* The Appellate Division opinion is reported at 72 A D 2d 758, 41 N.Y.S. 2d 826 and R-263. The decision at Special Term, Kings County is unreported, but is reproduced in the appellants' appendix (App. C., pp. 7a-13a).

Jurisdiction

Appellants claim that this Court may take jurisdiction pursuant to 28 U.S. Code, §§ 1357(2) and 2101(c). Although the appellants designate the judgment and order appealed from as final, it must be observed, at the outset, that the Court of Appeals declaration of constitutionality, contained in the order and judgment, stemmed from the Court's finding "that plaintiffs have not rebutted the presumption of constitutionality" predicated upon the Legislature's explicit finding with reference to the inadequate supply of residential housing accommodations (50 N Y 2d 994). Any element of finality in the order and judgment, therefore, appears to have stemmed from a failure of proof, a factual matter which does not merit review by this Court.

Statutes Involved

The New York City Administrative Code, Chapter 51, Title Y, §§ Y51-1.0-18.0, as amended (City Rent and Rehabilitation Law);

The New York City Administrative Code, Chapter 51, Title YY, §§ YY51-1.0-7.0, as amended (Rent Stabilization Law).

The foregoing are set forth only in part in Appellants' Appendix D and to some extent incorrectly.* They should be supplemented by the following legislative action which passed and extended the period of rent control after surveys, public hearings, and other legislative consideration of the continued need for rent control by reason of extreme shortage of housing:

(a) N.Y. City Council Res. 489 adopted March 27, 1979, finding continued need for rent control, City Council Minutes, pp. 594, 596 based on Committee on Housing & Buildings report, p. 593 and analytical report on census data by Professor Peter Marcuse, Council Minutes, Feb. 27, 1979, pp. 167-358.

(b) N.Y. City Council Res. 678A adopted March 30, 1976 finding continued need for rent control. City Council Minutes, pp. 394, 397, based on report of Comm. on General Welfare, Minutes, pp. 234, 235 and an analytical report on the census data by Dr. Lawrence N. Bloomberg, Minutes, pp. 237-394.

(c) N.Y. City Council Res. No. 1042 adopted March 29, 1973 finding continued need for rent control, Minutes, pp. 633, 634, 636, based on Report of Committee on Housing, Minutes, pp. 460, 461 and an

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* The correct text of the City Rent and Rehabilitation Law and the Rent Stabilization Law can be found in the New York City Charter and Code (William Press edition) pp. 472 through 551, and pocket supplement for 1979-1980, pp. 23 through 37; and in Rasch, New York City Rent Control (Lawyers Cooperative Pub. Co., 1973) pp. 343-414, 728-740, and 1980 pocket supplement pp. 26-40, 89-116.

analytical report of the census data by Dr. George Sternlieb, Minutes, pp. 461-633.

(d) N.Y. City Council Res. No. 68 adopted March 31, 1970 finding continued need for rent control. Minutes, pp. 1244, 1245, 1247, 1248 based on Report of Committee on Housing, pp. 1122, 1123 and an analytical report of the census data by Dr. Paul Niebanck, Minutes, pp. 1123 to 1244.

(e) N.Y. City Council Res. No. 831 adopted March 21, 1967 finding continued need for rent control. Minutes, pp. 802, 831 based on Report of Committee on General Welfare, pp. 801, 802 and a separately published analytical report of the census data by Dr. Chester Rapkin.

(f) New York City Council Resolution No. 704 adopted Jan. 28, 1964 finding continued need for rent control. City Council Minutes, pp. 146, 147, 148 based on Report of Committee on General Welfare, pp. 145, 146 and report by Administrator Hortense W. Gabel summarizing the Census Bureau findings, Council Minutes, Dec. 17, 1963, pp. 576, 577, 578, and a separately published report by Dr. Frank S. Kristof.

(g) New York Local Law 20 of 1962 to continue rent control under New York City auspices, as recommended by City Council, Committee on General Welfare report and passed by Council, City Council Minutes, April 10, 1962, pp. 700-706, 706-725.

(h) L. 1961, c. 337, § 1 extending rent control to June 30, 1963 and legislative report. McKinney's Sess. Law 1961, pp. 1971-1995.

(i) L. 1959, c. 695, § 1 extending rent control to June 30, 1961 and legislative report. McKinney's Sess. Law 1959, pp. 1826-1839.

(j) L. 1957, c. 755, § 1 extending rent control to June 30, 1959 and legislative report. McKinney's Sess. Laws 1957, pp. 1535-1549.

(k) L. 1955, c. 685, § 1 extending rent control to June 30, 1957 and legislative report. McKinney's Sess. Laws 1955, pp. 1543-1551.

(l) L. 1953, c. 321, § 1 extending rent control to June 30, 1955 and legislative report. McKinney's Sess. Laws 1953, pp. 1936-1948.

(m) L. 1951, c. 443, § 1 extending rent control to June 30, 1953 and legislative report. McKinney's Sess. Law 1951, pp. 1525-1532.

(n) L. 1950, c. 250, § 1 enacting rent control until June 30, 1962.

Background of Case

The N.Y. state legislature and the New York City Council have enacted and extended rent controls for very limited periods at least every two or three years for the last 30 years since federal controls lapsed. Since 1964, the New York City Council has periodically and consistently made careful findings of fact based on: (1) U.S. Census Bureau surveys which established the existence of an emergency situation caused by extreme scarcity of rental housing units; (2) scholarly analytical reports elaborating the Census Bureau housing surveys, and (3) open public hearings attended by hundreds of landlords and tenants. The police powers of the state have thus been invoked to protect the public welfare.

At all times the state and city rent control laws have provided a mechanism to provide rent increases sufficient to yield a minimum statutory return. For the last 10 years the city law guaranteed rents sufficient to cover expenses plus 8½ percent return on equalized assessed

valuation (equal to approximately 14.9 percent on the assessed value). There is no limit to rent increases which may be ordered if property is actually operating at a loss. No plaintiff claimed such losses or inability to obtain meaningful and prompt relief. The complaint in this action is the latest of perennial attacks on rent control instigated and financed by real estate interests. It claims that all the rent control statutes are unconstitutional. The critics of rent regulation marshalled by appellants in their papers blame those controls for the abandoned and deteriorating housing in N.Y.C., although similar conditions exist where there is no rent control.

The complaint also alleged that the statutes have been so poorly administered that the net effect was to deprive plaintiffs of the return on investment allowed by the statutes. The complaint does not support this bald allegation, even in prima facie fashion. The defendant city rent agency, on the other hand, showed: (1) that all of the complaints of inadequate administration referred to occurred in an unfortunate period, now long past; and (2) that currently, the agency timely and efficiently issues rent increase and other orders.

Plaintiffs' complaint is only a compendium of tired claims and political opinions opposed to retaining rent regulation in New York City rather than a legal pleading of facts which could prove unconstitutionality.

Appellants pointedly invite the courts to sit as a superlegislature to decide whether there is a housing shortage, and if so, what means are best suited to protect those adversely affected. We submit that this is not a proper judicial function, and that the refusal of the New York courts to do so does not raise any substantial federal question.

Prior Proceedings in This Case

A. The Pleadings and Motions

The action was commenced in July 1977, by service of a summons and complaint upon the defendants (R. 156-157). Plaintiffs were real estate trade organizations, and several individual and corporate landlords (R. 158-160).

The complaint demanded judgment granting a permanent injunction against defendants from continuing to enforce the City Rent Control Law and its State Enabling Act, the State Emergency Tenants Protection Act and the City Rent Stabilization Law, and declaring those laws to be unconstitutional. The complaint also demanded that plaintiffs be immediately allowed to collect an "economic rent" with provision for adjustments for fluctuation in operating and maintenance costs (R. 188). Apparently, plaintiffs intended to have the court substitute its own fashioned system of rent-control to replace the one designed by the legislature.

The defendants answered promptly (R. 209, 213), but the plaintiffs proceeded to do nothing further for almost a year. Then, in April, 1978, plaintiffs, believing there were no factual issues to be tried, moved for summary judgment (R. 21). Plaintiffs offered no factual matter in their moving papers. On affidavit relied basically on opinions in cases involving other matters (R. 24-50). Another affidavit by a trade association president quoted a variety of anti-rent control writings (R. 51-86). The third affidavit, by the president of a plaintiff corporation, made a similar argument predicated on newspaper clippings, and the like (R. 87-155).

The defendant city rent agency, cross-moved for summary judgment to dismiss plaintiffs' complaint and for a declaration of the constitutionality of the statutes. The City's affidavit demonstrated factually that there was no current basis for complaint about rent control operations

(R. 219-230). The attorney-general, for the State defendant, also cross-moved for dismissal of the action as to the State (R. 231).

B. The Decision at Special Term

The motions were heard on July 19, 1978 by Justice Franklin W. Morton, Jr., at Special Term, Kings County. He decided them in an opinion published only in the New York Law Journal on October 4, 1978, p. 13, c.2-4 (R. 13-20), and an order was entered on October 18, 1978 (R. 9-12). The court's order denied plaintiffs' motions for summary judgment to declare the challenged rent laws unconstitutional. The order also denied the cross-motions for dismissal made by the New York City and New York State defendants and the city's prayer for affirmative declaratory judgment of the constitutionality of the challenged law. Instead, the Court ordered that the action be placed on the appropriate trial calendar and proceed expeditiously to trial.

C. The Decision of the Appellate Division

Both plaintiffs and defendants disagreed with the Special Term decision and both appealed from the order and judgment to the Appellate Division, Second Department.

Upon questioning by the Presiding Justice of the Appellate Division, Second Department, at oral argument before that court, the appellants' attorney asserted that he did not believe there were any triable issues of fact and that he believed that the allegations of his complaint were sufficient to grant judgment on the pleadings. Our attorneys agreed that there were no triable issues of fact but contended that there should be judgment for defendants because plaintiffs failed to overcome the presumption of constitutionality of the statutes attacked.

The Appellate Division unanimously (72 A.D.2d 758, 421 N.Y.S.2d 826) dismissed the complaint for the reason

that ". . . plaintiffs have failed to submit sufficient evidence to rebut the presumption that the laws in question are constitutional . . . All parties to this matter request that a declaration as to constitutionality be made upon the instant record. In our opinion, plaintiffs have failed to set forth sufficient facts to rebut the presumption of constitutionality."

D. The Decision at the Court of Appeals

Only the appellants appealed to the Court of Appeals (R. 259) (Jur. Statement, p. 11, incorrectly says both parties appealed). In place of the Appellate Division finding simply dismissing the complaint, the Court of Appeals upheld the constitutionality of the rent control law. And although the record showed abundantly that the rent control law was for at least several years administered without substantial criticism, it rejected the "unconstitutional as administered" claim on a legal ground because of appellants' inability to cite any legal authority in support of their argument, and its belief that such objections to administration are political questions properly addressed to the legislative or executive branches of government.

ARGUMENT

The New York Court of Appeals correctly held that the New York statutes and regulations which regulate residential rents are constitutional.

A. The cases upholding rent statutes against specific challenges

Although this case is a challenge to the constitutionality of the New York City Rent Control Law, the State Enabling Act, the City Rent Stabilization Law, the Emergency Tenants Protection Act and other statutes or sections thereof as listed in the complaint, it fails to

clearly state any cognizable legal theory or to allege and prove any complaint of deprivation of a recognized, constitutionally protected right.

The constitutionality of rent controls has been sustained against a wide variety of attacks over a long number of years:

Block v. *Hirsh,* 256 U.S. 135 (1921);
Marcus Brown Co. v. *Feldman,* 256 U.S. 170 (1921);
People ex rel. Durham R. Corp. v. *La Fetra,* 230 N.Y. 429 (1921), app. dism. 257 U.S. 665 (1921);
Bowles v. *Willingham,* 321 U.S. 503 (1944);
Twentieth Century Associates v. *Waldman,* 294 N.Y. 571 (1945), app. dism. 326 U.S. 697, 90 L. Ed. 410 (1946);
Woods v. *Miller Co.,* 333 U.S. 138 (1948);
Lincoln Bldg. v. *Barr,* 1 N.Y. 2d 413, 153 N.Y.S. 2d 633 (1956), app. dism. 355 U.S. 12 (1957);
Four Maple Drive Realty Corp. v. *Abrams,* 2 A.D. 2d 753, 153 N.Y.S. 2d 747 (1956), affd. 2 N.Y. 2d 837, 159 N.Y.S. 2d 976 (1957), app. dism. 355 U.S. 14 (1957);
I.L.F.Y. Co. v. *Temporary State Housing Rent Commission,* 10 N.Y. 2d 263, 219 N.Y.S. 2d 249 (1961), app. dism. 369 U.S. 795 (1962);
8200 Realty Corp. v. *Lindsay,* 27 N.Y. 2d 124, 313 N.Y.S. 2d 733, app. dism. 400 U.S. 962 (1970);
Davenport v. *Berman,* 420 F. 2d 294;
Israel v. *City Rent and Rehabilitation Administration,* 285 F. Supp. 908, 910;
Amsterdam-Manhattan, Inc. v. *City Rent & R. Admin.,* 43 Misc. 2d 889, 252 N.Y.S. 2d 758, affd. 21 A.D. 2d 965, 252 N.Y.S. 2d 395, affd. 15 N.Y. 2d 1014, 260 N.Y.S. 2d 23.

The Second Circuit Court of Appeals has also twice upheld the constitutional validity of the procedure employed by the city rent agency.

Eisen v. *Eastman,* 421 F. 2d 560, 567;
Mkwanazi v. *Kenray Associates Inc.,* 410 F. 2d 1143, 1144.

The Rent Stabilization law was recently upheld against a constitutional challenge in *Kaplan* v. *Prince,* 444 U.S. 938, 62 L.Ed. 2d 304 (1979), which raised the following questions (48 U.S. Law Week 3166):

> "(1) Are rent control laws unconstitutional taking without just compenstaion to landowner in violation of Fifth and Fourteenth Amendments? (2) Does rent control law violate Article I, §10, and Fifth and Fourteenth Amendments because (a) law depends upon existence of emergency that did not exist at time of law's enactment and does not presently exist; (b) five percent or less vacancy rate standard for 'emergency' is undefined, illusory and self-perpetuating; (c) law applies indiscriminately to all residential dwellings without distinguishing classes of housing where rental and vacancy rates may be significantly higher; (d) law as applied to owner has required him to restore service that, under owner's leases with tenants, is optional and would have had no effect on rental rate? (3) Is due process denied when (a) administrative hearing officer does not prepare detailed report in violation of administrative tribunal's own rules; (b) administrative tribunal does not hear testimony or listen to available tape recording, no transcript of testimony is made, no hearing officer's report is prepared and agency is not otherwise adequately informed of proceeding? (4) Does due process require party to administrative hearing to be furnished with draft opinion that, if adopted by tribunal, will become decision of agency? (5) Does administrative agency delay of two years and three months between hearing and decision constitute denial of due process?"

This Court dismissed the appeal from the decision of the New York Appellate Division, First Department, "for want of a substantial federal question."

B. The police power as the basis for rent controls

To pass constitutional muster, a legislative measure enacted pursuant to the governmental police power must be directed to the effectuation of a constitutionally permissible objective and must employ means rationally related to achieving that governmental purpose. *Ferguson* v. *Skrupa,* 372 U.S. 726, 733 (1963), *Nebbia* v. *New York,* 291 U.S. 502, 537 (1934), *Gold* v. *DiCarlo,* 235 F. Supp. 817, 820 (S.D. N.Y., 1964),*aff'd.* 380 U.S. 520 (1965).

The use of both price and rent controls to accomplish legitimate legislative purposes have long been judicially approved modes of exercise of the police power. *Yakus* v. *U.S.,* 321 U.S. 414 (1944), *Sunshine Coal Co.* v. *Adkins,* 310 U.S. 381 (1940), *Nebbia* v. *New York,* 291 U.S. 502 (1934), *Block* v. *Hirsch,* 265 U.S. 135 (1921), *Gold* v. *DiCarlo,* 235 F. Supp. 817 (S.D., N.Y., 1964), *aff'd* 380 U.S. 520 (1965), *Helmsley* v. *Borough of Ft. Lee,* 78 N.J. 200, 394 A. 2d 65 (1978), app. dism. 440 U.S. 978 (1979).

C. Legislation does not become unconstitutional solely because it exists for more than a few years

Where the continued validity of a regulatory statute depends on the continued existence of a recited emergency, the reviewing court is guided by the dual presumption that the legislature had before it facts which support the enactment and that the legislation passed is a constitutional exercise of the police power. *U. S.* v. *Carolene Products,* 304 U.S. 144, 152 (1938), *South Carolina State Hwy. Dept.* v. *Barnwell Bros.,* 303 U.S. 177, 191 (1938), *Lincoln Bldg. Associates* v. *Barr,* 1 N.Y. 2d 413, 153 N.Y.S. 2d 633 (1956), app. dism. 355 U.S. 12 (1957), *East New York Sav. Bank* v. *Hahn,* 293 N.Y. 622, 627, *aff'd* 326 U.S. 230 (1945).

The courts should not substitute their own judgment for that of the legislature so long as there is any conceivable "state of facts either known or which could reasonably be assumed" to support the legislative enactment. *U.S.* v. *Carolene Products Co.*, 304 U.S. 144, 154; *East New York Sav. Bank* v, *Hahn*, 326 U.S. 230, 234; *Lincoln Bldg. Associates* v. *Barr*, 1 N.Y. 2d 413, 153 N.Y.S. 2d 633, 635, app. dism. 355 U.S. 12 (1957).

The New York State legislature made factual findings which supported controls when it enacted rent controls in 1950; when the State passed the Enabling Act in 1962 (L. 1962, ch. 21) (officially, the Local Emergency Housing Rent Control Act, McKinney's Uncon. Laws, Sec. 8601 *et seq.*) which transferred administration of New York City rent control to the city; and when the New York City Council enacted its own statute in 1962. In addition the state legislature renewed and amended the state law in 1951, 1953, 1955, 1957, 1959 and 1961. The City renewed the rent control law in 1964, 1967, 1970, 1973, 1976, and the last such findings were legislated on March 27, 1979. In every case the city renewal of rent control was based on a current housing census by the U.S. Census Bureau, an elaborate analysis of the census data by outside experts, and public hearings for landlords, tenants and others interested.

D. Recent legislative findings

The most recent housing survey, done by the U.S. Census Bureau and published in January 1979, found a net rental vacancy rate of 2.95% in 1978, well below the 5% figure which would automatically terminate rent control in New York City. P. Marcuse, *Rental Housing in the City of New York: Supply and Condition 1975-1978*, p. 6, p. 99, *et seq. See also*, New York Times, July 3 ,1979, p. B-1 and 4. This report was the basis for the city council's recent finding that a state of acute emergency continued in the rental housing market and its consequent

re-enactment of rent control for a new three year period. City Council Minutes, pp. 167 through 358, 475, 476, Res. No. 489.

E. The rent laws do not unconstitutionally "take" property

The rent control law authorized by the New York legislature provides virtually automatic general rent increases up to 7½% per year for all qualifying landlords. It requires the city rent agency to review the factors in its maximum base rents formula and make concomitant adjustments in rent ceilings on a biennial basis which has resulted in increases in the MBR rent ceilings of 8½% in 1974, 22% in 1976, 9% in 1978 and 10% in 1980 for a cumulative total of 58.7% since the 1972 increases, and a permissible possible total collectible increase of 91.7% at the rate of 7½% per year since 1972. The law also makes available additional rent increases for reasons of hardship, increased labor costs, increased fuel costs, additional equipment and facilities, major capital improvements, substantial rehabilitation, etc. *See,* Admin. Code, Sec. Y51-5.0; New York City Rent, Eviction and Rehabilitation Regulations, Part III, Sections 33 through 33.10, and 33d(2).

Appellants' arguments (Jur. Statement, p. 22) that the rate of return on investment allowed by the rent laws is so low as to amount to a "taking" in contravention of the constitutional guarantee against deprivation of property without due process, is fallacious. That guarantee protects individuals from direct governmental appropriation. It does not insulate one from the effects of—even consequential injuries from—lawful regulation. *Bowles* v. *Willingham,* 321 U.S. 503; *Basin, Inc.* v. *Federal Energy Admin.,* 552 F. 2d 931, 938 (Temp. Em. Ct. Apps. 1977), *cert. den.* 434 U.S. 821; *Condor Operating Co.* v. *Sawhill,* 514 F. 2d 351, 361 (Temp. Em. Ct. Apps. 1975), *cert. den.* 421 U.S. 976. The 8½ percent rate of return provided for in the rent control law clearly is not a "taking."

F. Urban housing decay is not caused by rent controls

In their attempt to causally link every conceivable real estate woe to the existence of rent regulations, appellants have made the emotionally charged allegation that abandonment and decrepitude of housing in New York City, particularly in the South Bronx, may also be laid at the doorstep of rent controls. However, a recent study in that area found that rent controls were *not* implicated as a cause, that they were in fact irrelevant to the abandonment problem. "Newsweek," October 10, 1977, "The Cities: Empty Houses," p. 100, citing a survey by the Women's City Club of New York.

George Sternlieb's "The Urban Housing Dilemma: The Dynamics of New York City's Rent Controlled Housing" (1972), cited by plaintiffs as supporting their contentions, (R. 64) actually reported (at pp. 350, 449, and 614) that landlords in areas with dilapidated housing did *not* point to rent controls as a significant factor in the rate of abandonment of housing, foreclosures or even as determinative of rent ceilings.

In the same vein, it has been shown that the rate of new construction in cities with rent controls is not significantly related to them. "Nation", May 26, 1979, "A Tenant Revolt," p. 597. A study conducted by John Gilderbloom for the California Department of Housing and Community Development, compared rates of new construction in 26 rent-controlled New Jersey cities with those in 37 non-controlled cities and found virtually "no net effect." "Nation", May 26, 1979, at 599. In New York there can hardly be expected to be any rent control-based decline in new construction since new construction is not subject to regulation.

The direct causes of abandonment noted in both the above reports were redlining, vandalism, and the failure of tenants to pay rents. This kind of "decay occurs in non-

controlled cities as well. A National Urban League study of abandonment found that New York ranked fifth behind four non-rent controlled cities (St. Louis, Cleveland, Chicago and Hoboken, N.J.)." "Nation," May 26, 1979, at 600.

G. The forum for resolution of differing political contentions is the legislature not the courts

The only discernible consistent statement made by plaintiffs has been their clear disagreement with and disapproval of the existence of rent controls, *i.e.*, an argument directed to the policies behind the adoption of the New York rent laws. Such arguments do not constitute a cause of action or a basis for judicial relief. The remedy available to plaintiffs based on their claims herein, if any, reposes with the legislature, and plaintiffs should seek their relief in the legislature. Plaintiffs' response is to complain that they cannot win in that forum because there are more tenants than landlords.

The California Supreme Court dealt with the same sort of argument in *Birkenfeld* v. *City of Berkley,* 130 Cal. Rptr. 465, 550 P. 2d 1001, 1013 (1976):

> "[I]t is argued that initiative enactment of local rent control measures violates landlords' due process rights because tenants are in the majority and will always vote in favor of rent control as a result of their direct economic interest in the outcome. The fact that the initiative process results in legislation reflecting the will of the majority and imposing certain burdens upon landlords can hardly be deemed a ground for holding the legislation invalid. It is of the essence of the police power to impose reasonable regulations upon private property rights to serve the larger public good. (*Queenside Hills Realty Co.* v. *Saxl* (1946), 328 U.S. 80, 82-83, 66 S.Ct. 850, 90 L. Ed. 1096; *Clemons* v. *City of Los Angeles* (1950), 36 222 P. 2d 439)."

Critical opinions of and disagreements with choices made by a legislative body should appropriately be directed to the legislative body. The law is well settled that the courts do not determine the weight and significance of economic and statistical reports and opinions, as appellants ask here, and that their weight and significance is evaluated by the legislative body in determining what laws to enact. In *East N. Y. Savings Bank* v. *Hahn,* 326 U. S. 230 (1945), it was stated:

> "We are invited to assess not only the range and incidence of what are claimed to be determining economic conditions insofar as they affect the mortgage market—bank deposits and war savings bonds; increased payrolls and store sales; available mortgage and rise in real estate values—but also to resolve controversy as to the causes and continuity of such improvements • • • Merely to enumerate the elements that have to be considered shows that the place for determining their weight and their significance is the legislature not the judiciary."

In summary, the essence of plaintiffs' attack on the constitutionality of state and local rent legislation is their contention that the legislatures that have repeatedly reenacted those laws have exercised bad judgment. Declarations of unconstitutionality cannot rest upon simple disagreement with the legislature.

H. The early difficulties of administration caused by the "MBR" law have long been resolved and standard rent control is now administered in a fair and efficient manner.

Anticipating that their direct attack on the legislation could fail, the plaintiffs resorted to an "unconstitutional-as-administered" theory which contends, in essence, that orders permitting statutory rent increases have been so

long delayed as to amount to a de-facto unconstitutional taking of property.

However, the complaint does not state any facts which could provide the basis of such a theory because the complaint only contains allegations which even if true, all refer to circumstances occurring more than five and six years ago.

Thus summary judgment against plaintiffs was proper because no triable issues of fact were ever raised by the pleadings (R. 53). To sustain their theory plaintiffs would be required to establish, that the laws are now so poorly administered as to amount to deprivation of plaintiffs' property. They have not pleaded so, and they made no showing of evidence in their summary judgment papers sufficient to define any issue of fact material or substantial enough to warrant a trial.

The reason that the complaint did not contain any facts to support plaintiffs' theory is evident from the factual affidavit submitted by the City to Special Term (R. 221 et seq.). It contained very striking statistical data which established that the city rent agency is remarkably efficient in its processing of applications, and particularly in the issuance of rent increase orders (R. 226).

The appellants argue about events resulting from early MBR processing. The defects in processing that occurred five and six years ago were cured first by the interim remedies granted landlords in the courts and finally in late 1974 and thereafter by a new system which expeditiously allowed for MBR rent increases. The cases cited to support plaintiffs' argument are irrelevant because they all refer to the early implementation period of the MBR law which ended in 1974 (R. 223, 226).

Plaintiffs' reliance on *Housing Development Administration, N.Y.C.* v. *Community Housing Improvement Program,* 398 N.Y.S. 2d 997 (App. Div., 2nd Dept., 1977), *aff'g*

90 Misc. 2d 813, 396 N.Y.S. 2d 125 (App. Term, 2nd & 11th Jud. Dists., 1977), *modifying* 83 Misc. 2d 977, 374 N.Y.S. 2d 520 (Civil Court, N.Y.C., 1975), is unwarranted. That case began as an action brought by the Housing Development Administration in Civil Court to enjoin certain landlords from cutting off heat and hot water to their tenants' apartments. The landlord-defendants responded by filing a one sentence counterclaim alleging that all the rent laws were unconstitutional, which was promptly seized upon by the Civil Court judge who held a trial on that claim despite the fact that he clearly lacked subject matter jurisdiction over it. The decision made by the Civil Court (Klieger, J.) on the counterclaim, based on wrongfully usurped jurisdiction, as well as the findings made by the Court at that time, are null and void. To the extent that those findings are considered at all, it must be noted that they are reflective of conditions prior to and during the implementation stages of the MBR system, a period long gone. The slight support originally given to the *Kleiger* case by the Appellate Division was withdrawn when this case was argued and it was decided that there was insufficient evidence to invalidate the rent control laws.

Applications for MBR rent increase are *now* self-executing and are collectible immediately upon service of notice on the tenants by the landlord. Protests are almost all current.

Conclusion

Appellants failed to state a cause of action upon which relief can be predicated. Appellants did not establish that they were personally injured in specific transactions with the rent office and have no standing, therefore, to challenge the constitutionality of the rent laws. They have pleaded no facts of deprivation of protected constitutional rights either through the operation of the rent laws or their administration by city agencies. Any cause of action which

appellants might have had, has been mooted by the progressive events of the last five years. Their true underlying complaint, that they simply don't like operating in a rental housing market affected by governmental regulation, is non-justiciable and therefore beyond the jurisdiction of the Court. *Queenside Hills Realty Co.* v. *Saxl,* 328 U.S. 80, 82 (1946), *U.S.* v. *Carolene Products Co.,* 304 U.S. 144, 154 (1938); *Block* v. *Hirsch,* 256 U.S. 135, 158 (1921).

The appeal should be dismissed for want of a substantial federal question, or in the alternative the order of the Court of Appeals entered June 26, 1980 should be affirmed.

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Dec. 19, 1980

Respectfully submitted,

HARRY MICHELSON
General Counsel
Rent Control Division, HPD
Attorney for Appellees
EDWARD KOCH, as Mayor of the City of New York,
ANTHONY GLIEDMAN, as Administrator of the Housing and Development Administration of New York City, and
DANIEL W. JOY, as Commissioner of the Department of Rent and Housing Maintenance of New York City
110 Church Street
New York, N.Y. 10007
212—566-5112